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No. 119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

O'NEAL MASSEY,
Petitioner,

v.

H. E. MOORE, WARDEN, TEXAS STATE PENITENTIARY AT HUNTSVILLE, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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October 12, 1954

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BRIEF FOR RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Preliminary Statement

Petitioner, O'Neal Massey, petitioned the United States District Court for the Southern District of Texas, Houston Division, for a writ of habeas corpus on the ground that he was denied due process of law under the Fourteenth Amendment to the United

States Constitution for failure of the Court to appoint counsel to represent him because of his alleged insanity at the time of his trial in 1941 in the State District Court. Petitioner made no claim and set out no facts other than insanity as grounds for the appointment of counsel. The Federal District Court denied the petition holding that the prior hearings and decisions by this same District Court and the affirmance by the Court of Appeals for the Fifth Circuit on May 9, 1949, settled all questions, including the question of Petitioner's mental condition at the time of his trial in 1941, except the one question: whether Petitioner on not having had counsel appointed to represent him at said trial was deprived of due process of law under the Fourteenth Amendment. The Court then held that, based upon the prior proceedings in the Federal District Court and in the State Courts, Petitioner's contention was without merit. The question of Petitioner's insanity having already been adjudicated adversely to Petitioner and no other grounds of unfairness or of misconduct at the 1941 trial in the State Court having been shown, Petitioner's petition was dismissed as having no merit. The Court of Appeals for the Fifth Circuit affirmed. This Court granted certiorari. Respondent prays that the judgment of the Court of Appeals for the Fifth Circuit be affirmed.

Opinions Below

The memorandum and order of the United States District Court are not reported. See Transcript of Record, page 44. The Opinion of the Court of Ap-

peals for the Fifth Circuit affirming the order of the United States District Court is reported at 205 F. 2d 665 (R. 46).

Jurisdiction

Petitioner is invoking the jurisdiction of this Honorable Court under the provisions of 28 U.S.C., Sec. 1254(1).

Statutes Involved

The statutes involved are the provisions of Article 63, of the Texas Penal Code, and are set forth in Appendix "A."

Question Presented

Where a Federal District Court has before it an application for writ of habeas corpus in which Petitioner alleges deprivation of due process under the Fourteenth Amendment to the Constitution of the United States on the grounds that because of alleged insanity at the time of his trial for a non-capital felony in the Courts of the State of Texas, the trial court should have, but failed to, appoint counsel for him, and the Federal District Court examined and considered all of the prior proceedings in that Court and the State Courts in which the merits of Petitioner's claim of insanity were fully developed and determined adversely to his contentions, and such records of prior proceedings failed to show, and Petitioner failed to allege in his petition, any ground

other than insanity which would require the appointment of counsel, is it error for the Court to refuse to issue the writ of habeas corpus or an order to show cause without a hearing?

Statement of the Case

On March 11, 1941, Petitioner was tried and convicted in the District Court of San Jacinto County, Texas on an indictment of robbery by assault, a non-capital offense (R. 41-42, Tr. 84). The indictment also charged the Petitioner with two prior convictions for non-capital felony offenses (R. 41). The Petitioner did not request the Court to appoint counsel to represent him and the offense charged being a non-capital felony and therefore not requiring appointment of counsel in the absence of special circumstances, and no special circumstances being made known to or appearing to the Court which would have required the Court to appoint counsel, no counsel was appointed to represent Petitioner (R. 42).

The District Attorney offered to recommend assessment of the minimum punishment of five years' confinement if the Petitioner desired to plead guilty to the indictment of robbery by assault (R. 42, 43). Petitioner refused this offer and insisted upon pleading not guilty and upon being tried by jury (R. 42, 43). Therefore, the Petitioner's plea of not guilty was entered and trial was before a jury (R. 42, 43, Tr 84). The jury found Petitioner guilty as charged and, in compliance with the mandatory provisions of Article 63 of the Texas Penal Code (Ap-

pendix "A"), Petitioner was sentenced to life imprisonment (R. 23, Tr. 84).

No appeal was ever taken by Petitioner to the Court of Criminal Appeals of Texas, the Court of last resort in criminal cases in the State of Texas, and the judgment became final (R. 23).

On March 22, 1943, after the judgment of conviction became final, Petitioner applied to the District Court of Montgomery County, Texas, for a writ of habeas corpus attacking the judgment and sentence of the trial court. His application was dismissed and, although notice of appeal was given, the appeal was never perfected (R. 7). This marked the beginning of a series of persistent and continuous collateral attacks on the judgment and sentence by virtue of which he is now confined in applications for writs of habeas corpus during the past eleven years, both in the Courts of the State of Texas and in the United States. In those proceedings, Petitioner contended that he was deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States because he was insane and was not represented by counsel during his trial in the State District Court in 1941. Respondent has attached hereto as Appendix "B" a list of some of these collateral attacks. In these prior proceedings, the Courts of the United States and of the State of Texas have consistently ruled adversely to the allegations and contentions of the Petitioner regarding his alleged insanity at the time of his trial and have refused to set aside the judgment and sentence of the trial court. The present proceeding began on July 14, 1952, with the filing of an application for

writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, in which the Petitioner claimed deprivation of due process of law under the Fourteenth Amendment to the Constitution of the United States on the ground that since he was insane at the time of his trial in 1941, the trial court should have appointed counsel for him (R. 2, 3).

In all prior proceedings the State and Federal Courts had ruled adversely to the Petitioner's contentions that he was insane at the time of his trial, and, with regard to his claim that he had not been represented by counsel at the time of his trial, the courts were faced with the recitation in the trial record that he was represented by counsel (R. 2). Petitioner did not show that he was not represented by counsel until 1952 when he obtained affidavits from the trial judge and the district attorney who conducted the trial proceedings stating that the record was in error and that in truth and in fact Petitioner was not represented by counsel (R. 2). Following the filing of the Petitioner's application for writ of habeas corpus in the Federal District Court on July 14, 1952, the memorandum and order of the court dated July 28, 1952 stated that he regarded the previous proceedings in that court as having finally determined all questions except the one question as to whether or not the failure of the trial court to appoint counsel for Petitioner deprived him of due process of law (R. 2).

On October 7, 1952, the Federal District Court in a memorandum and order declined either to award the writ of habeas corpus or to issue an order to

show cause (R. 44-45). The Court stated in that memorandum and order that he had considered the records of all prior proceedings in both the Federal and State Courts; that he regarded the proceedings in 1948 and the affirmations by the Court of Appeals for the Fifth Circuit as settling and finally determining all questions with respect to Petitioner's right to be released, except the one question—whether, since he was not represented by counsel at his trial, Petitioner was in custody in violation of the Constitution of the United States; that he had examined again all of the proceedings in that Court and in the State Courts and had reached the conclusion that Petitioner's contention that his trial was not in accordance with the Constitution was without merit (R. 44-45). It is from this memorandum and order of the Federal District Court that Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit (R. 47). The decision of the District Court was affirmed on June 26, 1953, in a very able opinion by Chief Judge Hutcheson, reported at 205 F. 2d 665 (R. 46-61).

On June 8, 1954, this Honorable Court granted the Petitioner's petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Summary of Argument

The Petitioner is incorrect in his argument that since the petition for writ of habeas corpus was denied below it must be assumed for the purpose of this proceeding that Petitioner was mentally incapable of conducting his own defense at the 1941 trial.

Petitioner adopts this unwarranted assumption at the outset of his brief (Petitioner's Brief, pp. 7, 9) and then throughout his argument argues as a matter of fact that Petitioner was insane at the time of his trial.

The petition for writ of habeas corpus was not summarily denied below merely on the grounds that Petitioner failed to state a claim warranting relief. The United States District Court denied the writ on two grounds. First: on the question of Petitioner's insanity at the time of his 1941 trial, the Court held that he regarded the proceedings in 1948 and the affirmance by the Court of Appeals on May 9, 1948 (173 F. 2d 980) as settling this question and further, under Section 2242, Title 28, of the United States Code, these proceedings were a final determination of this question (R. 44). Second: that since the question of Petitioner's insanity at the time of his 1941 trial had been decided adversely to him on the merits in the prior proceedings in 1948, the only remaining question was whether the Petitioner was denied due process of law because the Court did not appoint counsel to represent him (R. 44). The Court then said it had again examined all prior proceedings in that Court and in the State Courts and had found that Petitioner's contention on this one remaining question had no merit (R. 44).

Since Petitioner has been given a full hearing on the question of his mental condition at the time of his 1941 trial, and since this question has been decided on the merits adversely to him and he has not previously proven or now alleges any ground other than insanity which would have required the ap-

pointment of counsel, the judgment of the Federal District Court below should be upheld.

Argument

Since the only issue raised by Petitioner in his brief is that Petitioner was denied due process of law under the Fourteenth Amendment, because he was insane and therefore the Court should have appointed counsel to represent him (Petitioner's Brief, p. 3) the only question to be decided in this appeal is whether the question of Petitioner's mental condition at the time of his trial in the State District Court in 1941 has been decided on the merits. If the Petitioner has had a full hearing on the merits on that question and if it has been found that he was not of unsound mind on that date, then the question of whether counsel should have been appointed to represent him because such condition existed would, of course, have no merit. Then the only question remaining to be decided would be whether any other conditions existed that should have required appointment of counsel for Petitioner.

In his brief, Petitioner does not contend that any other conditions existed but, to the contrary, states that the presence or absence of affirmative misconduct on the part of the State at the trial is irrelevant (Petitioner's Brief, p. 8).

Petitioner had a full hearing on the merits upon the question of his mental condition as of the time of the 1941 State District Court trial, which issue was determined adversely to Petitioner (R. 18), and the holding was upheld by the Court of Appeals for

the Fifth Circuit. *O'Neal Massey v. H. E. Moore*, 173 F. 2d 980, Certiorari Denied by the U. S. Supreme Court, *Massey v. Moore*, 338 U. S. 837, 70 Sup. Ct. 46.

On pages 8 and 9 of his brief, Petitioner states that he alleged in the Court below that he was of unsound mind and that his petition was denied without a hearing and therefore his allegation of mental incapacity as well as his unchallenged allegation of lack of counsel must be taken as true in these procedures and that until this Court orders a hearing on the question of Petitioner's mental capacity to conduct his own defense at the trial, it must be assumed he was totally incapable of making any defense to the serious charges of the State. As authority for this unwarranted assumption, Petitioner cites *White v. Ragen*, 324 U.S. 760, 763 (1945); *House v. Mayo*, 324 U.S. 42, 45 (1945); *Williams v. Kaiser*, 323 U.S. 471, 473, 474 (1945). The rule laid down in these cases was that when a petition for writ of habeas corpus is denied without requiring Respondent to answer and without a hearing and where the opinion of the Court did not set out the reasons therefor, the Supreme Court on certiorari must assume that Petitioner's allegations are true.

This case does not fall within this rule because the Federal District Court denied the petition on the grounds that Petitioner had already had a full hearing on the questions raised, including Petitioner's insanity, except the one new issue raised as to whether Petitioner was represented by counsel and on this new issue the Court held, after an examina-

tion of prior proceedings and decisions in the Federal and State Courts, that the question was without merit (R. 44-45).

The Court stated it regarded the proceedings in 1948 affirmed by the Court of Appeals for the Fifth Circuit on May 9, 1949 (173 F. 2d 980) as settling all the questions raised with respect to Petitioner's right to be released, except one, which was the lack of representation by counsel, and on this question the Court held, after an examination of the record in the State and Federal Courts, that he found that it was without merit and agreed with the Court of Criminal Appeals of Texas in its holding that there was no showing that the failure to appoint counsel to represent Petitioner resulted in any unfairness or detriment to Petitioner (R. 44-45).

It cannot be questioned that the Court had the authority and duty to determine the sufficiency of Petitioner's petition with respect to both law and fact, not only from the allegations well plead, but upon the record, and for this purpose the record in the earlier proceedings import verity and are treated as part of the record in the present proceeding and only to the extent that the allegations of the petitioner in this proceeding are consistent with the record will they be assumed to be true. *Dorsey v. Gill*, 148 F. 2d 857, 80 U.S. App. D.C. 9 Certiorari Denied 65 Sup. Ct. 1580, 325 U.S. 890, 89 Law Ed. 2003. Therefore this Honorable Court could assume as true the allegation in Petitioner's petition that he was not represented by counsel because such allegation is consistent with the record, but this Honorable Court cannot assume that the allegations in the petition

claiming insanity at the time of trial and deprivation of due process under the Fourteenth Amendment because of lack of counsel to be true because both of such allegations are *not* consistent with the record.

An examination of the prior holdings that were before the District Court and the present proceeding show without question that Petitioner has had a full and fair hearing on his mental condition at the time of his trial in 1941 and that this issue has been decided adversely to him contrary to Petitioner's statement in footnote seven on page eight of his brief.

In Cause No. 2380, in the United States District Court for the Southern District of Texas, Houston Division, the Court, after a full hearing and after considering the merits of Petitioner's claim that at the time of his trial on March 11, 1941, he was insane, prepared and filed Findings of Fact and Conclusions of Law (R. 18). Among the Conclusions of Law, the Court held:

> "Clearly as indicated in the foregoing findings, he was at times and from time to time of unsound mind for several months before and several months after March 11, 1941, the date of the trial. But the evidence does not satisfactorily show that at the time of the trial, he was of unsound mind. . . ."

The Court held that "concluding that on the whole case, Petitioner fails, his petition for writ of habeas corpus is denied."

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court in Cause No. 2380 (R. 20). See *O'Neal Massey v. H. E. Moore*, Warden, 173 F. 2d 980.

On January 9, 1952, the United States District Court for the Southern District of Texas, Houston Division, in its order and memorandum disposing of an application by Petitioner for a writ of habeas corpus, held (R. 20):

> "Massey is in error in his claim that the question of whether he was of unsound mind at the time of such trial was not litigated and decided in such former case No. 2380 in this court. It was."

On July 28, 1952, in a memorandum and order of the United States District Court for the Southern District of Texas, Houston Division, held that there had already been a final determination by that Court and the United States Court of Appeals for the Fifth Circuit of all questions pertaining to Petitioner's application for writ of habeas corpus except the one question as to whether he had been deprived of due process of law because of the failure of the trial court to appoint counsel for him at his trial in 1941. Here again the court in substance held that the contention of Petitioner that he was insane at the time of his trial had been finally determined adversely to his contentions in a full hearing on the merits in that Court in 1948 in Cause No. 2380 (R. 2).

On October 7, 1952, in a memorandum and order the United States District Court for the Southern

District of Texas, Houston Division, declined either to award the writ of habeas corpus or to issue an order to show cause (R. 44) holding:

> "As has been stated, I regard the proceedings in 1948 and the affirmance by the Court of Appeals on May 9, 1949 (173 Fed. 2d 980) as settling all questions with respect to Petitioner's right to be released, except one. I regard same as a final determination of such matters under Section 2244, Title 28, of the Code, except on one question. That is that in the former proceedings in this Court, I found, in accordance with record of his conviction, that Massey was represented by counsel at his original trial, but it now appears that he was not.
>
> "On this question of whether, since he was not represented by counsel at his trial, he is in custody in violation of the Constitution, etc., of the United States, I have examined again all the proceedings in this Court and in the State Courts and have reached the conclusion that his contention that his trial was not in accordance with the Constitution is without merit. . . ."

It is clear that the Court adhered to its previous holdings that the contentions of the Petitioner that at the time of his trial he was insane had already been adjudicated and determined adversely to him in a full hearing on the merits. It is from this memorandum and order of the Federal District Court that Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit.

In the opinion filed June 26, 1953, and reported at 205 F. 2d 665 (R. 48), the United States Court of Appeals for the Fifth Circuit held:

> "Further, on his former application for relief by habeas corpus, the district judge, upon a hearing of the issue whether he was or was not insane at the time he was tried and was, therefore, entitled to relief, determined it against him and denied his petition, and we affirmed, 173 F(2) 980. The issue of his unsoundness of mind, which appellant's petition now tenders as a part of his claim that he should have been afforded counsel at his trial, is not available to him as an independent ground for release in this case. . . ."

The Petitioner admits in his brief that the only basis for appointment of counsel was by reason of the alleged insanity of Petitioner. He goes so far as to state that the presence or absence of misconduct on the part of the State is irrelevant (Petitioner's Brief, p. 8). We disagree with this contention of Petitioner and agree with the courts below, as has already been shown herein, that the question of Petitioner's insanity at the time of his 1941 trial having been determined adversely to him in prior proceedings after a full hearing on the merits, the only question remaining was whether there were other facts or circumstances which would have required the appointment of counsel. The courts below, guided by Texas law regarding the appointment of counsel in non-capital felony cases and the rules and principles laid down by this Court, were correct in holding,

after a review of the prior proceedings, that Petitioner's contention on this remaining issue regarding the appointment of counsel had no merit.

Under the rules of criminal procedure in force in the courts of the State of Texas, the appointment of counsel for an accused is ordinarily required only when the charge is that of a capital felony. Texas Code of Criminal Procedure (Vernon, 1948) Article 494; *Halton v. State*, 143 Tex. Crim. 415, 158 S.W. 2d 772, certiorari denied 316 U.S. 703 (1942).

However, it is a well established rule in Texas that the question concerning the necessity for appointment of counsel in instances where the accused is charged with a non-capital felony must be determined on the facts of each case.

In the case of *Parsons v. State*, 153 Tex. Crim. 157, 218 S.W. 2d 202 (1949), the Court of Criminal Appeals of Texas held that it was bound by the rule announced by the United States Supreme Court in *Uveges v. Pennsylvania*, 335 U.S. 437 (1948), to the effect that the necessity for the appointment of counsel for an accused on trial for a crime less than capital in a State court depends upon the facts in each case, in the determination of which there must be taken into consideration the gravity of the crime, the age and education of the accused, the conduct of the Court or prosecuting officials, and the complicated nature of the offense charged, and the possible defenses thereto.

In the opinion below by the United States Court of Appeals for the Fifth Circuit, 205 F. 2d 665 (R. 50) the Court ably stated the law in Texas as follows:

"In a long series of cases, beginning with *Parsons v. State*, 218 SW (2) 202, and ending in *Johnson v. State*, 251 SW (2) 739, including therein the opinion in the Massey case, 249 SW (2) supra, the Court of Criminal Appeals has dealt with the general question involved here, the effect upon a conviction in a less than capital case of the failure of the defendant to have the assistance of counsel. With an earnest purpose to apply the law as the Supreme Court of the United States has from time to time declared it, that court, canvassing the facts in each of the cases dealt with and hewing to the established line, that the appointment of counsel in a criminal case in the state court is not a legal right, and that each case must stand on its own facts and must be determined by a showing of whether or not due process has been violated, has deliberately, carefully, and, we think, correctly adjudicated each case, including Massey's, that has come before it . . ."

This Respondent respectfully points out to this Honorable Court that at the time of his trial on March 11, 1941, Petitioner herein was 29 years of age; by way of formal education, Petitioner had completed the Eighth Grade; Petitioner had been twice previously convicted for non-capital felony offenses in the Texas Courts, and by Petitioner's participation in the various proceedings subsequent to his trial, Petitioner has shown that he is a man of intelligence, able to cope with and give assistance in

the preparation and presentation of legal proceedings.

The United States Court of Appeals for the Fifth Circuit, after holding that the question of Petitioner's insanity at the time of his trial in 1941 had been determined against him and thereafter was not available to him as independent ground for release in this case, ably disposed of the remaining question as to whether Petitioner was denied due process because counsel was not appointed for him, in the following language (R. 51):

> "Giving the fullest effect to petitioner's claims of a denial of due process, all that can be made out of them is that he should have had counsel. He did not request the appointment of counsel. He did not complain because counsel was not appointed. He does not now show that anything was done to him unfairly or unjustly which, if he had had counsel he could have been protected from. He does not even claim or make any showing, if he does claim, that if he had had counsel, he would have acted differently, in respect to accepting the offer to take a plea of a five year sentence, than he did act without counsel. But if it be assumed that he is in effect complaining that if he had had the assistance of counsel, he would have been advised by counsel to plead guilty and take a five year sentence rather than run a chance of a third conviction with life imprisonment, and would have taken the advice, this would not avail him. For if unless it is to be held in every case where hindsight shows that the course

taken by defendant was not the wise one, that the failure to have the assistance of counsel converts what would otherwise be an error of judgment into a denial of due process, no violation of due process is presented here.

"We are in no doubt that but for the fact that in this case the defendant was a third offender and that, looking with hindsight at the result of his action in not accepting a plea, he would have been better advised to accept it, there would be no possible basis for a claim that anything occurred in the trial which constituted a violation of due process. We cannot agree that this fact furnishes the basis for a finding that he was denied due process. On the contrary, we agree with the opinion of the Court of Criminal Appeals of Texas that it did not.

"The judgment was right. It is AFFIRMED."

On page 9 of his brief, Petitioner, after arriving at the unwarranted conclusion that the Court must assume that he was totally incapable of making any defense against the charges of the State, then cites decisions of this Court which he alleges hold that if an insane or ignorant man is tried by a State court without counsel on a serious criminal charge, his inability to comprehend the legal issues before him will invalidate the conviction. Petitioner then says he was not only unskilled in the law but was also actually deranged at the time of the trial. In the first place, as has already been pointed out, the Courts below have held that Petitioner was not of unsound mind at the time of the trial in 1941. In the sec-

ond place, Petitioner has not previously proven any facts or circumstances nor alleged them in his petition for writ of habeas corpus which would bring him within the decisions of this Court cited by Petitioner. Thirdly, Petitioner was not ignorant nor illiterate as has been shown by his subsequent participation in various legal proceedings.

Petitioner then cites a number of legal principles that he says Petitioner was confronted with at his trial with which an insane person could not cope unless he had the assistance of counsel. Again this argument has no merit because, as above shown, Petitioner was not found to be of unsound mind and failed to allege or previously prove that Petitioner was ignorant or illiterate or that there was any unfair conduct on behalf of the District Judge or District Attorney that prevented Petitioner from having a fair trial.

The rule is well established that although the doctrine of res judicata does not apply to a judgment refusing to discharge a prisoner on habeas corpus, the records of earlier proceedings are treated as part of the record in the later proceedings as constituting the whole record which the judge must examine and consider in determining the sufficiency of the petition, *Dorsey v. Gill*, 148 F. 2d 857, 80 U.S. App. D.C. 9, certiorari denied 325 U.S. 890; *Ex parte Zimmerman*, 132 F. 2d 442, certiorari denied *Zimmerman v. Walker*, 319 U.S. 744, and where the record reveals that the only contention urged as a basis for the writ of habeas corpus brings to the Court's attention exactly the same ground upon which Petitioner had a full hearing on a previous

petition in which that issue had been determined adversely to Petitioner such prior determination of that ground may be taken into consideration by the Court in passing on the same question in the later proceeding. *Dorsey v. Gill*, supra. *Swihart v. Johnson*, 150 F. 2d 721, certiorari denied 327 U.S. 789; *Garrison v. Johnson*, 151 F. 2d 1011, certiorari denied 328 U.S. 840.

The basic ground upon which this Petitioner rests his contention of deprivation of due process is that he was insane at the time of his trial and therefore the Court should have appointed counsel for him. The issue of the Petitioner's insanity had already been determined adversely to his contention after a full hearing on the merits in the Federal District Court in 1948. It is settled that although an order dismissing one writ of habeas corpus does not formally estop a petitioner from suing out another writ on the same grounds, the Petitioner cannot again and again call upon the Court to repeat his decisions regarding that ground. *U.S. ex rel McCann v. Thompson*, 144 F. 2d 604, certiorari denied 323 U.S. 790.

We submit that if this Honorable Court remands this case back to the Federal District Court no other holding but the present one could be reached based upon the controlling facts and principles of law. It would be requiring the Court to again repeat its judgment regarding the only issue that Petitioner has raised, to wit: that by reason of his insanity on the date of his trial in 1941 the Court should have appointed counsel to represent him. As ably pointed out in the opinion below by the Court of Appeals for

the Fifth Circuit, the issue of his insanity having already been decided adversely to Petitioner after a full hearing on the merits, the Petitioner cannot now couple the issue of insanity with the claim of failure of appointment of counsel as an independent ground for relief.

Conclusion and Prayer

WHEREFORE, Respondent prays that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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A copy of this Brief, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, has been mailed this date to Dean Acheson and Roberts B. Owen, Jr., Covington and Burling, Union Trust Building, Washington 5, D. C., Attorneys for Petitioner (Air Mail Postage Prepaid).

APPENDIX "A"

Article 63 of the Texas Penal Code (Vernon 1948):

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

APPENDIX "B"

1. Massey was convicted in the District Court of San Jacinto County, Texas, on March 11, 1941, of robbery by assault with a finding of two previous convictions. Sentenced to life imprisonment. No appeal was taken.

2. On March 22, 1943, Massey applied to the District Court of Montgomery County for writ of habeas corpus. His application was dismissed on April 3, 1943. Notice of appeal was given but the apeal was not perfected.

3. In May of 1945 Massey filed a petition for writ of habeas corpus in the District Court of Walker County. On July 19, 1945, the writ was granted returnable to San Jacinto County and set for hearing July 6, 1945. On this latter date hearing was held on the application for writ of habeas corpus and also on the State's motion for entry of judgment nunc pro tunc. State's motion for judgment granted and application for writ of habeas corpus denied. On these two orders Massey appealed and the action of the trial court was affirmed on January 9, 1946. Rehearing denied January 30, 1946. See

Ex parte Massey, 191 S.W. 2d 877. Massey applied for writ of error to the Supreme Court of the United States and on October 21, 1946 [No. 34 Misc., October Term 1946] application was denied. See *Massey v. Texas*, 329 U.S. 674, 67 Sup. Ct. 109, 91 L.Ed. 595.

4. In October 1945 Massey made and filed application in the United States District Court for Southern District of Texas for the writ of habeas corpus. This was docketed as Civil Action 1711 and was denied.

5. On April 22, 1946 [109 Misc., October Term, 1945] Massey's original application for writ of habeas corpus was denied by the Supreme Court of the United States. See *In the Matter of O'Neal Massey*, 327 U.S. 770. Motion for leave to file petition for rehearing denied October 21, 1946. See 329 U.S. 823.

6. Massey filed original application for writ of habeas corpus in Court of Criminal Appeals of Texas and this was denied on December 4, 1946.

7. On October 28, 1946, Massey filed application for writ of habeas corpus, in United States District Court for Southern District of Texas, Houston Division. This was docketed as Civil Action No. 2380. On February 11, 1947, this application was denied for want of jurisdiction. On March 12, 1947, Massey filed petition for an order setting aside order next above described. This is nothing more than a jurisdictional statement. On strength of this statement, show cause order was entered April 4, 1947. On May 7, 1948, order was entered setting cause for hearing on May 27, 1948. On May 17, 1948, order was en-

tered appointing counsel for Massey. On May 27, 1948, the case was tried and on June 1, 1948, same was orally argued. On June 29, 1948, Judge Kennerly filed his findings of fact and conclusions of law, and on the same date denied the petition for writ of habeas corpus. Final decree was entered July 14, 1948. Appeal was perfected to the United States Court of Appeals for the Fifth Circuit where the action of the trial court was affirmed on May 9, 1949. See *O'Neal Massey v. H. E. Moore*, 173 F. 2d 980. Rehearing was denied June 1, 1949. Massey applied to the Supreme Court of the United States for certiorari, which was denied October 10, 1949. See *Massey v. Moore*, 338 U.S. 837, 70 Sup. Ct. 46.

8. In October of 1950 Massey filed another original application for writ of habeas corpus in the Court of Criminal Appeals of Texas. This appears to have been denied January 24, 1951.

9. In January 1952 Massey applied to the United Stated District Court for Southern District of Texas for writ of habeas corpus. On January 9, 1952, Judge Kennerly entered "Memorandum and Order of Court, declining to either award the writ of habeas corpus or to enter a show cause order" and also entered "Order of Court, denying petition for writ of habeas corpus."

10. On January 18, 1952, Judge Kennerly entered "Memorandum and Order of Court, overruling Massey's petition for rehearing."

11. On January 25, 1952, Judge Kennerly entered another supplementary order denying petition for rehearing.

12. On April 4, 1952, hearing was held in the District Court of Walker County, Texas on the application of Massey for a writ of habeas corpus. The findings of fact were transmitted by the Judge of the District Court of Walker County, Texas, to the Court of Criminal Appeals of Texas in compliance with the rules of procedure of this State. On May 28, 1952, the Court of Criminal Appeals of Texas, after reviewing such facts, denied petitioner's application for a writ of habeas corpus. *Ex parte Massey*, ... Tex. Crim. ....., 249 S.W. 2d 599 (1952). On June 25, 1952, petitioner's Motion for Rehearing was denied by the Court of Criminal Appeals of Texas. Petitioner made no effort to effect an appeal to, nor did he ever petition for a writ of certiorari in the United States Supreme Court.

13. On June 11, 1952, petitioner filed a motion in the Federal District Court for the Southern District of Texas to reinstate proceedings begun in that Court in January, 1952, which said motion was denied. On June 13, 1952 a Motion for Rehearing on the question of reinstating proceedings in the Federal District Court for the Southern District of Texas was denied by that Court. On June 21, 1952 the Federal District Court for the Southern District of Texas, held that petitioner must appeal the decision of the Court of Criminal Appeals of Texas (referred to in Item 12 above), to the United States Supreme Court before asking the Federal District Court for relief.

14. On July 28, 1952, Massey filed an application for writ of habeas corpus in the Federal District

Court for the Southern District of Texas, which was denied on October 7, 1952.

15. On June 26, 1953, on appeal from the decision of the Federal District Court for the Southern District of Texas (referred to in Item 14), the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. 205 F. 2d 665 (1953).